87 334

Supreme Court, U.S.
FILED
SEP 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. [redacted]

IN THE
**Supreme Court of the United States**
OCTOBER TERM 1987

---

SMITH BARNEY, HARRIS UPHAM & CO., INC.
and ALBERT ROBERTS III,
*Petitioners/Cross-Respondents,*

vs.

EDWARD J. ADRIAN and RUTH C. ADRIAN,
*Respondents/Cross-Petitioners.*

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

# BRIEF OF PETITIONERS/CROSS-RESPONDENTS IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI OF EDWARD J. ADRIAN AND RUTH C. ADRIAN

BENNETT FALK, ESQ.
KEITH OLIN, ESQ.
Ruden, Barnett, McClosky, Smith,
Schuster & Russell, P.A.
One Biscayne Tower, Suite 2020
Two South Biscayne Boulevard
Miami, Florida 33131
(305) 371-6262
*Attorneys for Petitioners/*
*Cross-Respondents*

## PARTIES TO THE PROCEEDINGS

1. EDWARD J. ADRIAN, Cross-petitioner/Plaintiff.
2. RUTH C. ADRIAN, Cross-petitioner/Plaintiff.
3. SMITH BARNEY, HARRIS UPHAM & CO., INC., Cross-respondent/Defendant ("SMITH BARNEY").[1]
4. ALBERT ROBERTS, III, Cross-respondent/Defendant ("ROBERTS").
5. MORTON L. ANNIS, JR., Cross-respondent/Defendant.

---

[1]Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, SMITH BARNEY lists all parent companies, subsidiaries (except wholly-owned subsidiaries); and affiliates as follows:

Primerica Corporation; Smith Barney, Inc.; IPO Holdings, Inc.; Institutional Property Owners, Inc. III; Institutional Property Owners, Inc. IV; Institutional Property Owners, Inc. V; 1345 Media Corp.; 1345 Realty Corporation; Americas Avenue Corporation; First Century Partners, Inc.; GYM Corporation; MLA 50 Corporation; MLA GP Corporation; Mutual Management Corporation; SB Depositary Corporation; SBD Lease Funding Corporation; Smith Barney Asset Management Co., Ltd.; Smith Barney BJV Corp.; Smith Barney Capital Corp.; Smith Barney Futures Partners, Inc.; Smith Barney Mortgage Capital Corp.; Smith Barney Mortgage Capital Group, Inc.; Smith, Barney Realty Services, Inc.; Twenty Broad Street Leasing Company, Incorporated; SB Asset Capital Corp.; Mutual Management Corporation; Associated Madison Companies, Inc.; AC Insurance Company; AC RE, Ltd.; Brookstone Insurance Company; Massachusetts Indemnity & Life Insurance Company; Executive Fund Life Insurance Company; National Benefit Life Insurance Company; Pennsylvania Life Insurance Company; Penn Casualty Insurance Company; Trans Pacific Life Insurance Company;

Footnote 1 (continued)

Transport Life Insurance Company; American Financial Life Insurance Company; Continental Life Insurance Company; Coronet Investment Company; Triad Life Insurance Corporation; Voyager Life Insurance Company; Voyager Atlantic Reinsurance Ltd.; First Protection Life Insurance Company; Voyager Life and Health Insurance Company; Voyager Insurance Services, Inc.; Voyager Protection Insurance Company; Voyager Guaranty Insurance Company; Voyager Life Insurance Company of South Carolina; American Capital Management & Research, Inc.; ACFS, Inc.; American Capital Advisors, Inc.; American Capital Asset Management, Inc.; American Capital Exchange Corporation; American Capital Financial Services, Inc.; American Capital Marketing, Inc.; American Capital Services, Inc.; American Capital Shareholders Corporation; AC Capital Management, Inc.; American Capital Corporation; AMAD Technologies Corp.; AMC Aircraft Corp.; Associated Direct Marketing Services, Inc.; BNC Operating Corp.; Canwood Corporation; Erisa Corporation; First Madison Capital Corp.; National Marketing Corporation; RCM Acquisition, Inc.; SCN Acquisitions Company; Satellite Conference Network, Inc.; Verochris Corporation; PennCorp Financial, Inc.; California Sales Agency, Inc.; Dixie Associates, Inc.; Midwest Region, Inc.; Midwest Region, Inc. of Colorado; Mississippi Region Associates, Inc.; North Atlantic Insurance Agency, Inc.; North Carolina United Associates, Inc.; Penn Marketing Corporation; Executive Fund Corporation; Penn Insurance Marketing Agency, Inc.; Penn Insurance Marketing Corporation; Penn Insurance Marketing Corporation of Arizona; Penn Marketing Corporation of Arkansas; Penn Marketing Corporation of Colorado; Penn Marketing Corporation of Maine; Penn Marketing Corporation of Maryland; Penn Marketing Corporation of Montana; Penn Marketing Corporation of New Mexico; Penn Marketing Corporation of Oregon; Penn Marketing Corporation of South Dakota; Penn Marketing Corporation of Utah; Penn Marketing Corporation of Wyoming; PennCorp Financial Services, Inc.; Mid-Atlantic Capital Insurance Company, Ltd.; PennCorp Group Management, Inc.; Pennsylvania

Footnote 1 (continued)

Equities Corporation; Pennsylvania Securities Company; P.G.A. Reinsurance, Inc.; PennCorp Financial, Inc.; Penn Re, Inc.; Safe Drivers Plan, Inc.; Southeastern Region Associates, Inc.; United Silver Spring Associates, Inc.; Voyager Group, Inc.; Voyager Indemnity Insurance Company; Voyager Property & Casualty Insurance Company; Voyager Reinsurance Company; Federated General Life Insurance Company; Voyager Securities, Inc.; Voyager Service Agreements, Inc.; Voyager Warranty Corporation; Voyager Service Warranties, Inc.; Key-Matic Southeast, Inc.; Gill & Associates, Inc.; Berg Enterprises, Inc.; B.E.I. Advisors, Inc.; The Berg Agency, Inc. (New Jersey); The Berg Agency, Inc. (New York); The Berg Agency-Pennsylvania, Inc.; Berg Associates; Berg Enterprise Realty, Inc.; Berg Enterprises Land Technology, Inc.; Berg Enterprises Realty, Inc.; Berg Relocation Company, Inc.; Berg Ventures, Inc.; The Blau and Berg Company; Brody-Blau-Berg Appraisal Company; Dublin Escrow, Inc.; Farrington Realty, Inc.; Margaretten & Company, Inc.; AC Finance Company; Margaretten Realty Company, Inc.; Margaretten Financial Services, Inc.; Margaretten & Company, Inc. of Wisconsin; North American Mortgage Corporation; North American Mortgage Corporation of Wisconsin; Metro Ventures, Inc.; M.K.L. Realty Corporation; The Real Estate Place, Inc.; Woodson Ventures, Inc.; American Specialty Retailing Group, Inc.; Dunham's Athleisure Corporation; The Musicland Group, Inc.; Barmour Music Corporation; Everest Plastics, Ltd.; Mourbar Music Corporation; Southtown Music, Inc.; Talmont Music Corporation; Weiss & Barry Copyrights; Fingerhut Companies, Inc.; FDC, Inc.; Figi's Inc.; Family Farm Gifts, Inc.; Figi's Gifts, Inc.; Fingerhut Corporation; Baker Rhodes Marketing Corporation; Baker Rhodes Warehouse Sale Corporation; Colour Graphics Corporation; Distribution & Transport, Inc.; Fingerhut Europe, Inc.; Aspect Mail Order Limited; Direct Trading and Marketing Limited; Fingerhut (UK) Limited (England); Worldlike Limited; Fingerhut Financial Services Corporation; Fingerhut Marketing Services, Inc.; Fingerhut Real Estate Corporation; Imperial Plastics, Inc.; Wiman Apparel, Inc.; Wiman

Footnote 1 (continued)

Corporation; Michigan Bulb Company; Littleton Advertising, Inc.; Rockwood Gardens; Progressive Nurseries, Inc.; Vita Leaf Laboratories, Inc.; Flower of the Month, Inc.; Looart Press, Inc.; Current, Inc.; MBLoo, Inc.; OWL Stores, Inc. (Colorado); OWL Stores, Inc. (California); Amco Biotech, Inc.; Ampole, Inc.; BCL, Inc.; Mirasure, Inc.; Mirasure Insurance Company, Ltd.; Pacific Basin Investments Ltd.; Primerica Corporation; Sumter & Choctaw Railway Company; Tech-Air Corporation; Tinmet Corporation; Naterm Corporation; Sibarco Holdings, Inc.; SBHU Life Agency of Ohio, Inc.; SBHU Life Agency of Oklahoma; SBHU Life Agency of Texas, Inc.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| PARTIES TO THE PROCEEDINGS | i |
| TABLE OF CONTENTS | v |
| TABLE OF AUTHORITIES | vi |
| SUMMARY OF ARGUMENT | 2 |
| REASONS FOR DENYING THE CROSS-PETITION FOR WRIT OF CERTIORARI | 3 |
| CONCLUSION | 8 |

## TABLE OF AUTHORITIES


| CASES: | PAGE |
|---|---|
| *Colangelo* v. *Dean Witter Reynolds, Inc.* [1985-86] FED. SEC. L. REP. (CCH) Paragraph 92,365 (M.D. Fla. 1985) | 6 |
| *Dixon* v. *United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965) | 6 |
| *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976) | 6 |
| *National Association of Greeting Card Publishers* v. *United States Postal Service*, 462 U.S. 810, 819-20, 103 S.Ct. 2717, 2724-25, 77 L.Ed.2d 195 (1983) | 4 |
| *Pate* v. *Robinson*, 383 U.S. 375, 377, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966) | 4 |
| *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 43-44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983) | 4 |
| *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1398 n. 17 (8th Cir. 1986) | 6 |
| *Shearson/American Express, Inc.* v. *McMahon*, 478 U.S. ___, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987) | 2, 4, 5, 6, 7, 8 |
| **STATUTES:** | |
| Federal Securities and Exchange Act of 1934 15 U.S.C. §78j(b)-[§10(b)] | 5, 6, 8 |
| **REGULATIONS:** | |
| Federal Securities and Exchange Commission 17 C.F.R. §240.15c2-2 | 2, 3, 4, 5, 6, 7, 8 |
| **RULES:** | |
| Rules of the Supreme Court of the United States Rule 17 | 2, 3, 5, 6 |

IN THE

# Supreme Court of the United States

OCTOBER TERM 1987

---

**No. 87-146**

---

SMITH BARNEY, HARRIS UPHAM & CO., INC. AND ALBERT ROBERTS III,

*Petitioners/Cross-Respondents,*

vs.

EDWARD J. ADRIAN AND RUTH C. ADRIAN,

*Respondents/Cross-Petitioners.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

## BRIEF OF PETITIONERS/CROSS-RESPONDENTS IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI OF EDWARD J. ADRIAN AND RUTH C. ADRIAN

## SUMMARY OF ARGUMENT

The Cross-Petition for Writ of Certiorari fails to raise issues that meet the criteria for review on writ of certiorari under Rule 17 of the Supreme Court of the United States.

Cross-Petitioners have failed to demonstrate the existence of conflicting decisions of any lower federal courts with respect to 17 C.F.R. §240.15c2-2, the establishment of erroneous precedent by the lower courts in this case with respect to that Rule, or that this case involves unusually important or difficult questions of federal law warranting review on writ of certiorari.

Cross-Petitioners' assertions with respect to the effect of 17 C.F.R. §240.15c2-2 also fail to present an important question of federal law. This Court's decision in *Shearson/American Express, Inc.* v. *McMahon,* 478 U.S. ____, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987), which held that claims arising under Section 10(b) of the Securities Exchange Act of 1934 are subject to arbitration under the Federal Arbitration Act, effectively vitiated the Securities and Exchange Commission's Rule 15c2-2, which was based upon the Commission's erroneous belief that Section 10(b) claims were in fact not arbitrable.

## REASONS FOR DENYING CROSS-PETITION FOR WRIT OF CERTIORARI

### The Cross-Petition Fails To Present Issues Suitable For Review on Certiorari

Rule 17 of the Supreme Court of the United States provides:

> **Considerations governing review on certiorari**
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The ADRIANS have failed to meet any of the criteria for review specified in Rule 17, and their Cross-Petition should therefore be denied.

**Failure to Meet Rule 17 Criteria**

The ADRIANS' Cross-Petition fails to make any showing that the issues raised with respect to 17 C.F.R. §240.15c2-2 ("Rule 15c2-2") are of such importance to the federal judicial system as to warrant certiorari review by the Supreme Court. The ADRIANS cite no conflicting circuit court of appeals or even district court decisions with respect to the effect of Rule 15c2-2 upon the arbitration of claims arising under the Securities Exchange Act of 1934. *Cf. Shearson/American Express, Inc.* v. *McMahon*, 478 U.S. ____, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987) (certiorari granted to resolve conflicts among lower courts on the issues of whether Section 10(b) and federal RICO Act claims were subject to arbitration under the Federal Arbitration Act); *National Association of Greeting Card Publishers* v. *United States Postal Service*, 462 U.S. 810, 819-20, 103 S.Ct. 2717, 2724-25, 77 L.Ed.2d 195 (1983) ("Because of the inconsistencies in the holdings of the Second and District of Columbia Circuits, we granted certiorari."). Nor have the ADRIANS demonstrated that the decisions of the lower courts in the instant case have created precedent for use in other cases concerning the applicability of Rule 15c2-2. Furthermore, given the clear impact of the *McMahon* decision upon Rule 15c2-2, *see infra*, it cannot be said that the ADRIANS have raised any particularly difficult or novel question of federal or constitutional law. *See, e.g., Pate* v. *Robinson*, 383 U.S. 375, 377, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966) (certiorari granted to resolve "difficult questions" of federal-state relations); *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 43-44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983) (certiorari granted to resolve important constitutional issues and lower court conflicts).

**Cross-Petitioners' Arguments**

In their Cross-Petition, however, the ADRIANS make the following claim:

> This Court should exercise its discretionary certiorari jurisdiction in this case for several reasons within the purview of Rule 17, Rules of the Supreme Court of the United States. First, an important question of Federal law, the effect of 17 C.F.R. §240.15c2-2, although timely raised, has been overlooked or ignored by the courts below. Second, the decision of the circuit court on this case conflicts with this Court's decision in *McMahon, supra.*

Cross-Petition for Writ of Certiorari at 2. Neither of the two reasons advanced by the ADRIANS as alternative bases to invoke review on writ of certiorari can withstand scrutiny.

First, the ADRIANS' assertion concerning the purported effect of Rule 15c2-2 upon the parties' agreement to arbitrate fails to present an important question of federal law. In *Shearson/American Express, Inc.* v. *McMahon*, 478 U.S. ____, 107 S.Ct. 2332, 55 U.S.L.W. 4757 (June 8, 1987), this Court held that claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), are subject to arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§1-14. As the *McMahon* decision noted, "Rule 15c2-2 was premised on the [Securities and Exchange] Commission's assumption, based upon court of appeals decisions following *Wilko* [v. *Swan*, 346 U.S. 427 (1953)], that agreements to arbitrate Rule 10b-5 claims were not, in fact, arbitrable." 107 S.Ct. at 2341 n. 3 (quoting Brief for the Securities and Exchange Commission as *Amicus Curiae* at 18 n. 13, *Shearson/American Express, Inc.* v. *McMahon*, 107 S.Ct. 2332 (1987) (No. 86-44)). Rule 15c2-2 thus constituted the

Securities and Exchange Commission's attempt to articulate in rule form what it considered to be a settled principle of law at the date of its promulgation. *Phillips* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1398 n. 17 (8th Cir. 1986); *Colangelo* v. *Dean Witter Reynolds, Inc.*, [1985-86] FED. SEC.L.REP. (CCH) Paragraph 92,365 at 92,330 (M.D. Fla. 1985). As the *McMahon* decision clearly settled, however, the Securities and Exchange Commission was mistaken in its assessment of the arbitrability of Section 10(b) claims. *McMahon*, 107 S.Ct. at 2343.

The scope of the Securities and Exchange Commission's authority is, of course, circumscribed by the language of the controlling statutes. The Commission is empowered only "to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976) (quoting *Dixon* v. *United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965)). In the wake of *McMahon*, it is clear that Rule 15c2-2 fails to comport with the will of Congress as expressed in the Securities Exchange Act of 1934 and the Federal Arbitration Act. Having been effectively vitiated by *McMahon* (and apparently recognized to be erroneous by the Securities and Exchange Commission, *see McMahon*, 107 S.Ct. at 2341 n. 3), Rule 15c2-2 lacks continued vitality and no longer presents an important question of federal law for purposes of certiorari review under Rule 17 of the United States Supreme Court.

The second reason given by the ADRIANS for seeking a writ of certiorari, their claim that a conflict exists between the decision of the circuit court in this case and *McMahon*, is also inaccurate. The conflict alluded to by Cross-Petitioners is the direct and irreconcilable conflict between the decision of the court of appeals in this case and this Court's

recent decision in *McMahon* with respect to the arbitrability of claims arising under Section 10(b) of the Securities Exchange Act of 1934 and the federal RICO Act. Such conflict only constitutes a basis for granting SMITH BARNEY and ROBERTS' Petition for Writ of Certiorari (which the ADRIANS do not oppose[2]), however, and not the ADRIANS' Cross-Petition for Writ of Certiorari.

No conflict exists between any holding in *McMahon* with respect to 17 C.F.R. §240.15c2-2 and any lower court holding or finding in this case with respect to that rule. Neither the district court nor the court of appeals even addressed the ADRIANS' arguments with respect to 17 C.F.R. §240.15c2-2. To the contrary, the decisions of the courts below were entirely consistent with *McMahon* in that neither held or found that Rule 15c2-2 was a bar to arbitration. Even if one were to assume *arguendo* that Rule 15c2-2 rendered arbitration agreements unenforceable, assumed that the Commission's interpretation had the force of law, and further assumed that the lower court's rulings in this case conflicted with Rule 15c2-2, this Court has already resolved the alleged conflict by its ruling in *McMahon*, which effectively vitiated Rule 15c2-2. Thus, there is no conflict for purposes of the Cross-Petition for Certiorari.

This Court should deny the ADRIANS' Cross-Petition for Writ of Certiorari.

[2] *See* ADRIANS' Brief of Respondents In Response To Petition Of Smith Barney, Harris Upham & Co., Inc. And Albert Roberts, III, For Writ of Certiorari at 2 ("However . . . this Court should grant the writ [sought by SMITH BARNEY and ROBERTS] . . . .").

## CONCLUSION

For the foregoing reasons, Petitioners/Cross-Respondents, SMITH BARNEY and ROBERTS, respectfully request that this Court deny the ADRIANS' Cross-Petition for Writ of Certiorari.

Petitioners/Cross-Respondents further respectfully request, however, that this Court grant their Petition for Writ of Certiorari to review the decision of the Eleventh Circuit Court below to the extent it holds, contrary to the subsequent *McMahon* decision, that claims under §10(b) of the 1934 Act and the RICO Act are exempt from the provisions of the Federal Arbitration Act.

Respectfully submitted,

BENNETT FALK, ESQ.
KEITH OLIN, ESQ.

Ruden, Barnett, McClosky, Smith,
Schuster & Russell, P.A.
One Biscayne Tower, Suite 2020
Two South Biscayne Boulevard
Miami, Florida 33131
(305) 371-6262
*Attorneys for Petitioners/Cross-Respondents*